9 Otto 193
Ct. D. # 78

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~329.~~ 68

JAMES H. ALVORD, FRANKLIN SHISSLER, JAMES BAKER, JOHN WOOD, AND LOYAL P. BROWN, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF IDAHO.

FILED DECEMBER 13, 1875.

SUPREME COURT OF THE UNITED STATES.

No. 329.

JAMES H. ALVORD, FRANKLIN SHISSLER, JAMES BAKER, JOHN WOOD, AND LOYAL P. BROWN, PLAINTIFFS IN ERROR,

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1 UNITED STATES OF AMERICA,
District of Idaho Territory:

In the district court of the United States of America for the 1st judicial district of Idaho Territory in and for the county of Nez Perce.

THE UNITED STATES, PLAINTIFF,
against
JAMES H. ALVORD, FRANKLIN SHISLER, JAMES Baker, John Wood, and Loyal P. Brown, defendants.

The plaintiff, by Jo. W. Huston, district attorney of the United States for the Territory of Idaho, comes and complains of and against the defendants, and alleges the following facts as constituting its cause of action:

1st. That on or about the 17th day of August, 1865, the above-named defendant, James H. Alvord, was by the President of the United States appointed marshal of the United States for Idaho Territory, for the term of four years from the date of such appointment, unless sooner removed.

2 That, on the 12th day of August, A. D. 1865, the said defendants, James H. Alvord as principal, and the said defendants Franklin Shisler, James Baker, John Wood, and Loyal P. Brown as sureties, did make, execute, and deliver to the said plaintiff their certain bond or writing-obligatory (a copy of which is hereto annexed and forms a part of this complaint, reference being thereto had for greater certainty), wherein and by the terms whereof the said defendants jointly and severally bind themselves, their heirs, executors, and administrators, to this plaintiff in the sum of twenty thousand dollars, as therein stated, conditioned that the said defendant James H. Alvord, by himself, and by his deputies, should faithfully perform all the duties of the said office of marshal as aforesaid; that afterwards, to wit, on the 17th day of August, 1865, said bond and the sufficiency of the sureties therein was duly approved by the Hon. Aleck C. Smith, then associate

3 justice of the supreme court of Idaho Territory, and was duly filed in the office of the clerk of the district court for the 1st judicial district of said Territory of Idaho, at Lewiston, in the county of Nez Perce, in said district and Territory, and that thereupon the said defendant James H. Alvord entered upon the discharge of the duties of said office of marshal as aforesaid.

2d. That afterwards, and on or about the 18th day of January, A. D. 1866, the said defendant James H. Alvord was by the President of the United States, by and with the advice and consent of the Senate of the United States, reappointed marshal of the United States for the Territory of Idaho, for the term of four years from said 18th day of January, A. D. 1866, unless sooner removed; that afterwards, and on the 7th day of August, A. D. 1866, in pursuance of the requirements of law, at Lewiston, in the county of Nez Perce, in said Territory of Idaho, the said defendant James H. Alvord, as principal, and the said defendants

4 Franklin Shisler, James Baker, John Wood, and Loyal P. Brown, as sureties, therein did make, execute, and deliver unto the plaintiff (the United States) their certain bond or writing-obligatory, a copy of which is hereto annexed and forms a part of this complaint (and reference is thereto had for greater certainty), wherein and by the terms whereof the said above-named defendants jointly and

severally bound themselves, their heirs, executors, and administrators, to this plaintiff in the sum of twenty thousand dollars, as therein stated, conditioned that the said defendant James H. Alvord, by himself and by his deputies, should faithfully perform all the duties of said office of marshal as aforesaid, which said bond and the sufficiency of the sureties therein was duly approved by Hon. Milton Kelly, then associate justice of the supreme court of Idaho Territory, and was filed in the office of the clerk of the district court of the 1st judicial district of said Territory, at Lewiston, in the county of Nez Perce, in said district and Territory.

5 That thereupon, and on said day last aforesaid, the said defendant James H. Alvord entered upon the discharge of the duties of the said office of marshal as aforesaid.

3rd. That it became and was a part of the legal and legitimate duties appertaining to the said office of marshal as aforesaid, and to the said defendant James H. Alvord, as the incumbant thereof, to receive certain sums of money from the plaintiff through its Treasury Department, and to pay, lay out, and expend the same in paying the expenses of the several courts of the United States within and for said Territory, and to account therefor to the proper accounting officers of the plaintiff, under and according to the provisions and requirements of law.

4th. That the said defendant James H. Alvord, as marshal as aforesaid, at divers times between the said 12th day of August, 1865, and the 18th day of September, 1869, did receive of and from the said plaintiff, through its Treasury Department, a large sum of money, to wit, the sum of twenty thousand dollars, to be paid, laid out, expended,

6 and accounted for by him to the proper accounting officers of said plaintiff as aforesaid, in the faithful discharge of his duties as such marshal as aforesaid, in pursuance of the requirements of law.

5th. And the said plaintiff, by its said attorney, avers that the said defendant James H. Alvord has not and did not faithfully perform all the duties of the said office of marshal as aforesaid, in this, that the said James H. Alvord, as marshal aforesaid, has not nor did not pay, lay out, expend, and account for to the plaintiff, as required by law, for the money so as aforesaid received by him from the plaintiff through its Department of Treasury; but that a large sum of money so as aforesaid received by him, the said James H. Alvord, as marshal as aforesaid, to be by him paid, laid out, expended, and accounted for to the plaintiff as aforesaid, to wit, the sum of six thousand two hundred and ten dollars and eighty-three cents ($\$6{,}210\frac{83}{100}$), has not been by

7 him, the said James H. Alvord, so paid, laid out, expended, and accounted for as aforesaid; but now is, and for a long time has been, kept and retained by him, the said James H. Alvord, and by him converted to his own use and benefit, and that there is now due and owing to the said plaintiff by said defendant James H. Alvord, for moneys so as aforesaid received by him from the plaintiff for the purposes aforesaid, and by him, the said James H. Alvord, unjustly and unlawfully converted and appropriated to his own use, the sum of six thousand two hundred and ten dollars and eighty-three cents ($\$6{,}210\frac{83}{100}$), whereby, and by reason of the premises, the said bonds or writings obligatory of him, the said James H. Alvord, as principal, and his said co-defendants, Franklin Shisler, James Baker, John Wood, and Loyal P. Brown, as sureties, has become forfeited, and the said obligors therein have become and justly are indebted to the plaintiff in the sum of six thousand two hundred and ten dollars and eighty-three cents

($6,210\frac{83}{100}$) and the interest thereon, and the same has not been
8 paid, nor no part thereof.

Wherefore the plaintiff demands judgment against the said defendants, James H. Alvord, James Baker, Franklin Shisler, John Wood, and Loyal P. Brown, for the sum of six thousand two hundred and ten dollars and eighty-three cents ($6,210\frac{83}{100}$), with interest thereon from the 15th day of October, A. D. 1868, and for costs of this action, and demands as security therefor the enforcement of all such liens and provisional remedies as are provided by law.

(Signed) JO. W. HUSTON,
U. S. Dist. Attorney for the Territory of Idaho.

TERRITORY OF IDAHO,
County of Ada, ss:

Jo. W. Huston, being first duly sworn, says that he is the U. S. dist. att'y for Idaho Territory; that he has read the foregoing complaint by him subscribed, and that he knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which
9 are therein stated upon information and belief, and as to those matters he believes it to be true.

JO. W. HUSTON.

Subscribed & sworn to before me this 14th day of August, A. D. 1871.

E. A. HOLLISTER, *Clerk.*

Copy of bond of James H. Alvord as marshal of I. T.

[Int. rev. stamp $1, cancelled.]

Know all men by these presents, that we, James H. Alvord, F. Shisler, James Baker, and John Wood, and Loyal P. Brown, of the town of Florence, and of this dis't, in the Territory of Idaho, are held and firmly bound unto the United States of America in the sum of twenty thousand dollars, lawful money of the said United States, to be paid to the said United States; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Signed with our hands and sealed with our seals this 12th day of August, 1865.

10 The condition of the above obligation is such, whereas the President of the United States hath, pursuant to law, appointed the said James H. Alvord to be marshal of the United States for the Territory of Idaho, to have and to hold the same, with all the rights, privileges, and emoluments thereunto lawfully appertaining, for four years from the twelfth day of August, 1865, unless sooner removed therefrom, as by a commission to him bearing date the seventeenth day of August, 1865, more fully appears.

Now, if the said James H. Alvord, by himself and by his deputies, shall faithfully perform all the duties of the said office of marshal, then this obligation to be void; otherwise to remain in full force and virtue.

(Signed) JAMES H. ALVORD.
FRANKLIN SHISLER.
JAMES BAKER.
JOHN WOOD.
LOYAL P. BROWN.

I hereby approve of the within bond, and hereby certify that they, the sureties, are actually householders and inhabitants and free-
11 holders of this district, and that each is worth the actual sum of money mentioned in the within bond, over and above all just debts and liabilities and property exempt from execution.

Dated this 17th day of August, A. D. 1875.

ALECK C. SMITH,
Judge 1st Ju'al Dis't and Associate Justice
Supreme Court of Idaho Territory.

TERRITORY OF IDAHO,
County of Nez Perce:

I, G. Krebs, clerk of the dis't court of the first judicial district, Territory of Idaho, do hereby certify that I have compared the foregoing copy of a bond, and of the endorsements thereupon, with the original records of the same remaining in this office on file, as well as on record, and that the same is a correct copy therefrom.

Witness my hand and seal of said court this 22d day of March, A. D. 1866.

[SEAL OF COURT.] (Signed) G. KREBS, *Clerk.*

(Endorsed:) Filed Aug't 17th, 1865. (Signed) G. Krebs, clerk.

12 *Copy of James H. Alvord's bond as U .S. marshal for Idaho Territory.*

Know all men by these presents, that we, James H. Alvord, Franklin Shisler, James Baker, John Wood, and L. P. Brown, of the 1st judicial district, in the Territory of Idaho, are held and firmly bound unto the United States of America in the sum of twenty thousand dollars, lawful money of the said United States, to be paid to the said United States; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Signed with our hands and sealed with our seals this 7th day of August, A. D. 1866.

The condition of the above obligation is such, whereas the President of the United States hath, pursuant to law, appointed the said James H. Alvord to be marshal of the United States for the Territory of Idaho, to have and to hold the same, with all the rights, priviliges, and
13 emoluments thereunto lawfully appertaining, for four years from the 18th day of January, A. D. 1866, unless sooner removed therefrom, as by a commission to him bearing date the eighteenth day of January, A. D. 1866, more fully appears. Now, if the said James H. Alvord, by himself and by his deputies, shall faithfully perform all the duties of the said office of marshal, then this obligation to be void; otherwise to remain in full force and virtue.

(Signed) J. H. ALVORD.
F. SHISLER.
JAMES BAKER.
JOHN WOOD.
L. P. BROWN.

[1 dollar int. rev. stamp canceled.]

TERRITORY OF IDAHO,
County of Idaho, ss:

James Baker, being duly sworn, says on oath that he is one of the above-named persons who executed the above bond, and that he is a

resident of Idaho Territory and is worth the sum of five thousand dollars in property in this Territory over and above all debts and liabilities exclusive of property exempt fom execution.

(Signed) JAMES BAKER.

14 Sworn and subscribed before me this 5th day of Oct., 1866.

(Signed) MILTON KELLY,
Ass't Justice, Supreme Court, Idaho T'y.

[5 c't rev. st'p, cancelled.]

TERRITORY OF IDAHO,
County of Idaho, ss:

John Wood, being duly sworn, on oath says that he is one of the above-named persons who executed the above bond, and that he is a resident of the Territory, and is worth the sum of five thousand dollars in property in this Territory over and above all debts and liabilities exclusive of property exempt from execution.

(Signed) JOHN WOOD.

Sworn and subscribed before me this 6th day of Oct., 1866.

(Signed) MILTON KELLY,
Ass't Justice Sup. C't, Idaho Territory.

[5 c't rev. stamp, cancelled.]

TERRITORY OF IDAHO,
County of Nez Perce, ss:

Loyal P. Brown, being duly sworn, on oath says that he is one
15 of the persons who executed the foregoing bond, and that he is a resident of Idaho Territory, and is worth the sum of five thousand dollars in property in this Territory over and above all debts and liabilities exclusive of property exempt from execution.

(Signed) LOYAL P. BROWN.

Sworn & subscribed before me this 12th day of October, 1866.

MILTON KELLY,
Asso. Justice Sup. C't, Idaho Territory.

[Internal revenue stamps to the amount of 6 cents, cancelled.]

TERRITORY OF IDAHO,
County of Nez Perce, ss:

Franklin Shisler being duly sworn, on oath says that he is one of the persons who executed the foregoing bond, and that he is a resident of Idaho Territory, and is worth the sum of five thousand dollars in property in this Territory over and above all just debts and liabilities exclusive of property exempt from execution.

(Signed) FRANKLIN SHISLER.

Sworn and subscribed before me this 15th day of Octo., 1866.

MILTON KELLY,
Asso. Justice Supr. C't, Idaho Territory.

[Internal-revenue stamps to the amount of 6 cents, cancelled.]

16 *Certificate.*

TERRITORY OF IDAHO,
Nez Perce County, ss:

Office of the clerk of the district court of the first judicial district, Idaho Territory, Nez Perce County.

I, Seth S. Slater, clerk of the district court, first judicial district, Ida-

ho Territory, do hereby certify that the following and annexed instrument to be a full, true, and correct copy of bond now on file in my office.

Witness my hand and the seal of said court affixed this third day of March, the year of our Lord eighteen hundred and sixty-nine.

{SEAL OF U. S. DIST. COURT, 1ST JUD'L DIST., IDAHO TERR.} (Signed) SETH S. SLATER,
Clerk, District Court.

This is to certify that Seth S. Slater, whose name is annexed to the within certificate, is now, and was at the time of making said certificate, the clerk of the district court of the first judicial district of Idaho;
17 that he received said appointment and holds the same from me by reason of my position as judge of said first judicial district, and as asso. justice of the sup. c't of Idaho; that I am well acquainted with his signature and the seal of said court, and I know the signature to be genuine, and said seal is the genuine seal of said court, and that said Slater has the sole control of said seal, and the exclusive right to use the same.

Boise City, Idaho, March 10th, 1869.

(Signed) MILTON KELLY,
Asso, Justice of Idaho & Judge 1st Judicial District.

(Endorsed:) Filed M'ch 25th, 1872. H. Squeir, clerk, U. S. dist. court, 1st jud'l district, I. T.

18 UNITED STATES OF AMERICA,
District of Idaho Territory:

In the district court of the United States for the first judicial district of Idaho Territory, in and for the county of Nez Perce.

THE UNITED STATES, PLAINTIFF,
against
JAMES H. ALVORD, FRANKLIN SHISLER, James Baker, John Wood, and Loyal P. Brown, defendants.

The President of the United States of America sends greeting to James H. Alvord, Franklin Shisler, James Baker, John Wood, and Loyal P. Brown, defendants:

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the district court of the United States for the first judicial district of Idaho Territory, in and for the county of Nez Perce, and to answer the complaint filed therein within ten days (exclusive of the day of service) after service on you of this summons, if served within this county, or if served out of this county, but
19 in this district, within twenty days, otherwise within thirty days, or judgment by default will be taken against you according to the prayer of said complaint.

The said action is brought to recover the sum of six thousand two hundred and ten dollars and eighty-three cents ($6,210\frac{83}{100}$) due from the defendants to plaintiff upon certain bonds or writings obligatory, made by the defendants on the 12th day of August, A. D. 1865, and on the 7th day of August, A. D. 1866, particularly described in the complaint, reference thereto made for greater certainty; also for interest on the

said sum of $6,210\frac{83}{100}$ from the 15th day of October, A. D. 1868, and for costs of this action.

And you are hereby notified that if you fail to appear and answer the said complaint as above required, the said plaintiff will take judgment against you for said sum of six thousand two hundred and ten dollars and eighty-three cents ($6,210\frac{83}{100}$) and interest thereon from the 15th day of October, A. D. 1868, and costs.

20 Given under my hand and the seal of the district court of the United States for the first judicial district of Idaho Territory, in and for the county of Nez Perce, this 29th day of March, A. D. 1872.

(Signed) H. SQUIER,
Clerk U. S. Dist. Court 1st Jud'l Dist.

I hereby certify that I served the within summons by leaving a copy of the same with Loyal P. Brown, at M't Idaho, Nez Perce Co., I. T., on the 4th day of April, A. D. 1872.

(Signed) JOSEPH PINKHAM,
U. S. Marshal,
By C. P. COBURN, *D'p'ty.*

I hereby certify that I served the within summons by leaving a copy of the same with James Baker at White Bird, Idaho Co., I. T., on the 5th day of April, A. D. 1872.

(Signed) JOSEPH PINKHAM,
U. S. Marshal,
By C. P. COBURN, *D'p'ty.*

I hereby certify that I served the within summons by leaving a
21 copy of the same (together with a certified copy of the complaint) with James H. Alvord, at Slate Creek, Idaho Co., I. T., on the 5th day of April, A. D. 1872.

(Signed) JOSEPH PINKHAM,
U. S. Marshal,
By C. P. COBURN, *D'p'ty.*

I hereby certify that I served the within summons by leaving a copy with John Wood at John Day's Creek, Idaho Co., I. T., on the 6th day of April, A. D. 1872.

(Signed) JOSEPH PINKHAM,
U. S. Marshal,
By C. P. COBURN, *D'p'ty.*

I hereby certify that I served the within summons by leaving a copy of the same with Frank Shissler, at Salmon River, on the 6th day of April, A. D. 1872.

(Signed) JOSEPH PINKHAM,
U. S. Marshal,
By C. P. COBURN, *D'p'ty.*

(Endorsed :) Filed April 13th, 1872. H. Squier, clerk.

22 UNITED STATES OF AMERICA,
District of Idaho Territory:

In the district court of the United States for the first judicial district of Idaho Territory in and for the county of Nez Perce.

THE UNITED STATES, PLAINTIFF,
ag'st
JAMES H. ALVORD, FRANKLIN SHISSLER, James Baker, John Wood, and Loyal P. Brown, defendants.

And now comes James H. Alvord, the above principal defendant in the above-entitled action, who demurs to the complaint in the foregoing action upon the ground that the complaint aforesaid does not state facts sufficient to constitute a cause of action.

(Signed) JAMES H. ALVORD,
Principal Defendant.

I hereby accept service of the within demurrer and waive copy.
JO. W. HUSTON,
U. S. Att'y for Idaho,
By JOHN CLARK,
His substitute for May Term U. S. Dist. Court, 1st Jud'l Dist. I. T., 1872.

23 (Endorsed:) Filed April 20th, 1872. H. Squier, clerk.

District court of the first jud. district, Territory of Idaho, Nez Perce County.

THE UNITED STATES, PL'FF,
vs.
JAMES H. ALVORD ET AL., DEF'TS.

The United States, by J. W. Huston, U. S. district attorney for the Territory of Idaho, and the defendants, Alvord et al., by their attorneys, McBride and Henly, hereby stipulate and agree that the def'ts will withdraw or waive any demurrer to the complaint in the above-entitled action, and that they may have until the fifteenth day of June next to file any answer they may wish to make to the said complaint. It is further stipulated that the agreement shall be without prejudice to the right of the pl'ff to make or def'ts to oppose any motion in the mean time, or at any time, for a change of venue in said cause.

(Signed) JO. W. HUSTON,
U. S. Att'y for Idaho T'y.
24 McBRIDE & HENLY,
Att's for Def'ts.

BOISE CITY, *April 20th*, 1872.

(Endorsed:) Filed May 8th, 1872. (Signed) H. Squier, clerk.

In the district court of the first judicial district of Idaho Territory.

THE UNITED STATES, PLAINTIFF,
vs.
JAMES H. ALVORD ET AL., DEFENDANTS.

Now comes the defendants, James H. Alvord, Franklin Shisler, James

Baker, John Wood, and Loyal P. Brown, and files this their answer in the above-entitled cause and say: That defendants James H. Alvord, as alleged in the complaint, was the marshal of the United States for the Territory of Idaho, and the other defendants his sureties as alleged.

That said defendant Alvord received moneys from the plaintiff
25 for the uses and purposes therein alleged; and defendants deny that he has not paid out, laid out, and expended the sum of money or any sum so by him received in his said official capacity, and deny that a large sum, to wit, six thousand two hundred and ten and $\frac{83}{100}$ dollars, or any other sum, has not been expended or accounted for as charged, or in any other manner, and deny that he has kept said sum or any sum, and converted the same or any part thereof to his own use, in any manner unlawfully or otherwise, and denies that said sum is now due the United States or any sum on account or in any manner whatever.

And defendants further say that said defendant Alvord in his said official capacity, and for the lawful use of plaintiff, and for which plaintiff was justly and legally responsible, he paid out and expended the said sum of ($6,210$\frac{83}{100}$) dollars, and that he has made his lawful claim thereto to the proper accounting officer of the Treasury o the United States, and the said officer neglected and refused to defendant his just
26 and lawful credit therefor.

That said sums were expended as follows:

For office-rent	$2, 102 50
Freight on U. S. Statute' for 1st dist. court	75 00
Bill for printing blanks	40 00
Rep'r'g chairs for court-room	12 00
Wyatt's bill as bailiff U. S. c't	12 00
A. B. Smith, U. S. clerk (p'd p'r draft)	60 00
Witness & interpreters' fees in court at 1st jud'l dis't	40 40
Guard for prisoners in 1st district and expenses	218 50
Expenses in pursuit of Tho's Cory, charged with robbing U. S. mail, with writ	500 00
Expenses in arrest and pursuit of Brady, criminal, in 3d jud'l dis't	174 00
Expenses of U. S. vs. Tripp	264 00
Expenses in pursuing H. C. Gilson, indicted for embezzlement of U. S. moneys	482 66
Expenses of suppres'ing riot in Owyhee Co., under proclamation of the governor	487 50
Expenses of taking care of U. S. property in Lewiston and bringing same to Boise City	600 00
Lights & fuel for office	191 50
27 Expenses in capturing one Wheeler, an escaped criminal, charged with robbing U. S. mail	326 25
Guarding U. S. property and secretary's office	45 00
Expenses of summoning jury disallowed in 3d jud'l dis't	101 32

All of which sums were expended by defendant Alvord in the proper discharge of his official duties as said marshal, and he is entitled to the proper credit therefor, and the plaintiff is and has been properly chargeable therewith.

Wherefore defendants claim the right to counter-claim, recount, and sett off against the plaintiff's demand each and every of said claims to the full extent thereof, and demands judgment against the plaintiff therefor.

Defendants therefore deny that there is anything due the plaintiff, or that the plaintiff is entitled to any judgment, as prayed for in their complaint, or in any amount, and they therefore pray they may be dismissed, and ask for the costs.

(Signed) MILTON KELLY,
Att'y for Def'ts.

28 TERRITORY OF IDAHO,
County of Ada, ss:

Milton Kelly, being duly sworn, says he is one of the attorneys for the defendant in the above-entitled action; that he resides in Boise City, Ada County, Idaho Territory; that said defendant Alvord is the real defendant in this action, and resides in Idaho County, I. T., 400 miles and over from this county; that Shisler, Baker, and Wood, sued as sureties, reside in Idaho County, and L. P. Brown, another surety, resides in Nez Perce County, and each of said sureties are 400 miles from this city; that affiant and J. R. McBride, esqr., who reside in this city, are the only attorneys for d'f't employed to put in the answer; that affiant is acquainted with the facts set up in the foregoing answer, having learned them from the said James H. Alvord by conversation and by letter, and now having his accounts and duplicate vouchers in his hands; that, for the foregoing reasons, affiant makes this affidavit for the defendants; and further affiant sayeth not.

(Signed) MILTON KELLY.

29 Subscribed & sworn to before me this 14th day of Sept., 1872.

[SEAL SUP. C'T.] A. L. RICHARDSON,
Clerk Sup. C't, I. T.

LEWISTON, NEZ PERCE COUNTY, I. T.,
May 21st, 1873.

James H. Alvord, being duly sworn, says he is the principal defendant in the foregoing action; that he has heard read the answer of defendants, and knows the contents thereof; that the same is true, of his own knowledge, except as to those matters stated on information and belief, and as to those matters he believes it to be true, with the further exception that $300.00 of the charge or item of 326\frac{21}{100}$ for capturing one Wheeler has not been presented to the Treasury Department for allowance, for the reason that affiant has been unable to obtain the vouchers from the parties to whom said $300.00 was paid.

(Signed) JAMES H. ALVORD.

Subscribed and sworn to before me this 21st day of May, A. D. 1873.

(Signed) H. SQUIER, *Clerk.*

30 (Endorsed:) I accept service of copy of the foregoing and waive all objections in regard to time of filing.

Sept. 14th, 1872.

(Signed) JO. W. HUSTON,
U. S. Att'y for Idaho T'y.

Filed Sept. 14, 1872.

H. SQUIER, *Clerk.*

31 THE UNITED STATES }
vs.
JAMES H. ALVORD ET AL. }

It is hereby stipulated that the def'ts in the above cause may have until the 15th day of September next to file his answer in the above cause, and the stipulation heretofore made shall be extended to that time without impairing any of the other stipulations of said stipulation.

August 2d, 1872, Boise City, I. T.

(Signed) JOHN McBRIDE &
M. KELLY,
Att'ys for Def'ts.
JO. W. HUSTON,
U. S. Att'y for Idaho T'y.

(Endorsed:) Filed Sept. 14th, 1872. H. Squier, clerk.

32 *Stipulation.*

District court of the first judicial district, Territory of Idaho, October term, 1872.

THE UNITED STATES
vs.
JAMES H. ALVORD ET AL.

Now on this day it is stipulated and agreed by the parties herein, viz, the plaintiff, by the U. S. district attorney, and the defendants, by their attorneys, Kelly and McBride, that this cause shall stand continued until the next regular term of the said court occurring next after the October term, A. D. 1872.

Boise City, Oct. 21st, A. D. 1872.

JO. W. HUSTON,
U. S. Att'y for I. T.
KELLY & McBRIDE,
Att'y for Def't.

(Endorsed:) Filed Oct. 24th, 1872. (Signed) H. Squier, clerk.

33 UNITED STATES, PL'FF,
vs.
JAMES H. ALVORD, FRANKLIN SHISLER, JAMES Baker, L. P. Brown, and John Wood, def'ts.

This is to certify that I have this the 28th day of April, A. D. 1873, employed and authorized Alonzo Leland, esqr., to appear and act for me as attorney in the defence of the above-entitled action, in whatever court it may be prosecuted.

(Signed) JOHN WOOD.

(Endorsed:) Filed May 14th, 1873. (Signed) H. Squiers, clerk.

34 THE UNITED STATES
vs.
JAMES H. ALVORD ET AL.

Now comes John Wood, one of the defendants in the above action, and moves the court that pl'ff in the above action cause an attachment to issue against the property of J. H. Alvord, the principal upon said bond, as a means of safety to the surety, John Wood, upon said bond. His motion is made upon the accompanying affidavit of John Wood.

May 14th, 1873, at Lewiston.

(Signed) A. LELAND,
Att'y for John Wood, for said motion.

(Endorsed:) Filed May 14, 1872. (Signed) H. Squiers, clerk.

35 THE UNITED STATES
vs.
JAMES H. ALVORD ET AL.

TERRITORY OF IDAHO,
County of Nez Perce, ss:

John Wood, having been duly sworn, says that he is made one of the defendants in the above action, being one of the sureties on the bond of

the said J. H. Alvord. That soon after the commencement of said action affiant called upon said Alvord to ascertain his financial condition, and what he had for defence, and that said Alvord informed affiant that he had much more property than the amount claimed in said complaint which was subject to attachment and execution; that affiant need have no fears of ever having to pay any part of any judgment obtained in said action, and further told affiant that he had a good defense in law and equity to said action, and urged that affiant give himself no anxiety in relation thereto, that affiant should be held unharmed by reason of his being surety upon said bond; affiant then proposed that he would employ an attorney at his own expense to protect the interest
36 of affiant in said suit, whereupon the said Alvord then protested against any other attorney in the defense of the action than those the said Alvord had employed, saying that they were able and ample to defend against the action successfully. Upon these representations and the apparently sound financial condition of the said Alvord at that time and ability to pay whatever judgment might be obtained against him, affiant was lulled to quiet and content. Affiant then was knowing to the fact that said Alvord was then the owner of a much larger amount of property subject to attachment than sufficient to pay the claim of the plaintiff, and affiant then from the complaint and summons believed that the plaintiff was to avail himself of an attachment lien upon said property, and from this cause also affiant deemed himself secure.

Affiant further says, that he has seen and heard of movements
37 on the part of said Alvord to induce in him the belief that he has disposed of a large portion of his said property, and is seeking to dispose of the remainder, and before a judgment can be obtained, if one be rendered against said Alvord, he will have so far disposed of his property that comparatively nothing will remain as the property of the said Alvord subject to levy by execution under said judgment.

Affiant further believes that the plaintiff in this action at the time of its commencement and for a long time afterwards could have availed himself of the benefit of an attachment-lien upon the property of the said Alvord, so as to have entirely saved his bondsmen, including this affiant, from any and all liabilities to said plaintiff, and failing so to do, this affiant ought to be released from all obligation given in said bond on his part; that affiant as a bondsman has been misled to understand such lien to be attempted by said plaintiff by reason of said complaint and summons served, which lien, as affiant has recently been informed, has never been obtained.

38 Affiant further says, that so soon as he learned the true state of the facts relating to said lien, and the purpose of said Alvord to dispose of said property, affiant repaired to Lewiston and informed the deputy U. S. attorney of these facts. This information was given April 25th, 1873, that to the best of affiant's knowledge and belief, the plaintiff has taken no steps toward securing a lien upon the remaining portion of said Alvord's property for the payment of any judgment obtained upon the trial. Affiant believes himself to have been greatly injured by the laches of plaintiff, and that he should not be farther held liable upon said bond.

(Signed) JOHN WOOD.

Subscribed and sworn to before me this 1st day of May, A. D. 1873.

(Signed) W. C. WHITSON,
Dis't Judge.

(Endorsed): Filed May 14th, 1873. (Signed) H. Squier, clerk.

39 THE UNITED STATES
vs.
J. H. ALVORD ET AL.

Now comes John Wood and moves the court that he be discharged from his obligation as surety upon the bond sued upon in the above action. Said motion is made upon the affidavit of John Wood and upon the papers in said action.

(Signed) A. LELAND.
Att'y for John Wood for the purpose of said motion.

(Endorsed): Filed May 16th, 1873. (Signed) H. Squier, clerk.

40 THE UNITED STATES
vs.
JAMES H. ALVORD ET AL.

The defendants object to the transcript of the books of the Treasury Department offered in evidence in this case by pl'ffs' counsel, and say the same cannot be admitted, and state the following grounds therefor:

First. There is no sufficient certificate attached thereto. It does not state that it is a full and complete transcript or exhibit of the accounts between pl'ff and d'f't.

The certificate of the register is deficient in this: it does not pretend that the transcript shows all the credits the def't Alvord is entitled to, or all the disallowances that have been made, or a statement of all the differences therein, nor does the certificate show that the accounts current annexed to said transcript are all the accounts current between pl'ff and def't Alvord, or that said account current so annexed shows all the differences in relation to said accounts.

That said certificate by the controller, that he has examined
41 and adjusted the accounts between the United States and James H. Alvord, late U. S. marshal, &c., and showing thereunder only shows balances at a certain time. It is no exhibit of the whole account between pl'ff and defendant. This adjustment purports to be from some other statement or balance, without any items given. The credits given do not show what they are for, nor do they purport to be all the credits the def't is entitled to. It is not properly authenticated. The statement of differences is not a full exhibit of pl'ffs' accounts with def't. It does not show, nor does it purport to show all the credits to which the def't is entitled, or all of his disallowances. It is merely a statement of balances and sums in gross. The three papers attached to the transcript as accounts current are no part of the books of the Treasury Department. They are not all the accounts current rendered by def't Alvord, and are only sums in gross, liable to be changed or altered at any subsequent rendering of an account current, by cut-
42 ting down, adding to, or striking out the items which make up the gross sums.

There is nothing in this transcript which goes to show the sum total set down against Alvord; nor does it show or pretend to show all the credits def't is entitled to, or all his allowances.

(Signed) MILTON KELLY,
Att'y for Def'ts.

(Endorsed): Filed May 21st, 1873. (Signed) H. Squier, clerk.

43 In the dist. court, 1st judicial dist., I. T.

UNITED STATES
vs.
JAMES H. ALVORD ET AL.

Now comes Milton Kelly, of counsel for def'ts, and moves the court for a continuance in this action for the want of a transcript from the Treasury Department of the United States, and other material evidence for their defence, which facts and circumstances are fully set forth in the accompanying affidavaits of James H. Alvord, one of the def'ts, and D. L. Noggle, and asks the court that the same may be continued until the next regular term of this court.

(Signed) SMITH & KELLY,
Att'ys for Def'ts.

(Endorsed:) Filed May 28, 1873. (Signed) H. Squier, clerk.

44 In the dist. court, 1st judicial dist. I. T., Nez Perce County, ss:

THE UNITED STATES
vs.
JAMES H. ALVORD ET AL.

Now comes the defendant James H. Alvord, in open court, the United States attorney, Jo. W. Huston, esqr., being present, makes oath and says, that he is equitably entitled to credits, which have been previous to the commencement of this suit submitted to the consideration of the accounting officers of the U. S. Treasury Department, and rejected, to wit, the claim of $2,012\frac{50}{100}$ set up in his answer for office rent.

Freight on U. S. Statutes	75 00
Bill for printing blanks	40 00
Repairing chairs for court-house	12 00
Wyatt's bill as bailiff for U. S. court	12 00
N. B. Smith U. S. clerk	60 00
Witness fees in 1st dist	40 40
Guard for prisoners in 1st dist	218 50
Expenses in pursuit of Tho's Corey	500 00
Expenses in arrest of Brady	174 50
Expenses in U. S. vs. Tripp	264 00
Expenses in pursuing H. C. Gilson	482 66
Suppressing Owyhee riot	560 00
Expenses in bringing U. S. property from Lewiston, I. T., to Boise City, I. T., about	600 00
45 Guarding Secretary's office	45 00
Summoning jury in 3d district	101 32

All of which claims and sums are set up in defendant's answer in this action, and the original vouchers therefor are in the Treasury Department at Washington. Affiant further says he has fully and fairly stated the nature of said claims, and his defense to his said counsel, Milton Kelly, and he is advised by his said counsel that they are equitable credits, and ought to be allowed, and that he has a good and valid defense to all of said action, which he verily believes.

And affiant further says, that he placed a schedule of his said claims in the hands of D. L. Noggle, on or about the 1st of February last, with instructions to go to the Treasury Department of the United States and procure a duly authenticated transcript of all of his said rejected claims

and the original vouchers therefor. That he is now informed by said D. L. Noggle, whose affidavit is hereto annexed, that he did so proceed to the Treasury Department at Washington, and called upon the Comptroller of the Treasury, R. W. Taylor, and the Auditor of the Treasury,
who has said claims in his special charge, (whose name he does
46 not now recollect,) on or about the 26th day of February last, and informed them of the nature of his business, and said Comptroller and Auditor refused to deliver said rejected vouchers to said D. L. Noggle, or give him a statement of any nature whatever in regard to affiant's accounts or his rejected claims. Affiant says that said D. L. Noggle returned to this Territory since the commencement of this term of court. That he has not since had time, nor since he learned of the refusal of the Treasury Department to give up said vouchers, and make a statement of his credits and rejected claims, to take other and further steps to procure the same, that he cannot safely come to trial at this term of court, that he does not ask a continuance for delay, but that justice may be done, that if this cause is continued until the next term of this court, he belives he will be able to procure his said original vouchers, and a certified statement of his credits and rejected claims, from the Treasury Department, wherefore he asks for a continuance.

(Signed) J. H. ALVORD.

Subscribed and sworn to before me this 28th day of May, A. D. 1873.

(Signed) H. SQUIER, *Clerk.*

47 TERRITORY OF IDAHO,
County of Nez Perce, ss:

D. L. Noggle, being duly sworn on oath, says that he has heard read the affidavit of James H. Alvord, hereto annexed; that he took a schedule of the claims of said Alvord, as set forth in his said affidavit, and a large number of duplicate vouchers representing said claims, and on or about the 26th day of February last proceeded to the Treasury Department of the United States and called upon the Controller, R. W. Taylor, and the Auditor, who had the original vouchers of said Alvord in his special charge, and demanded all of his, said Alvord's, rejected vouchers, and a certificate of his said rejected claims, and informed the said Controller and Auditor that he done so at the request of Alvord, for the purpose of bringing them here, so that the said Alvord might use such certificate and vouchers in his defense in this suit.

That affiant was refused said vouchers and certificate by said Controller and Auditor; that such refusal was not upon the ground
48 that he was not a duly authorized agent of Alvord to receive them, or that he would not pay the necessary expenses for making such certificate, which he was authorized and prepared to do, but they put it upon the ground that the original vouchers, rejected or otherwise, must remain on file in the Treasury Department, and they had already sent all the necessary evidence of the rejection of said claims to this court. That affiant returned to this Territory within the past week.

(Signed) D. L. NOGGLE.

Subscribed and sworn to before me this 28th day of May, A. D. 1873.

H. SQUIER, *Clerk.*

(Endorsed:) Filed May 28th, 1873. (Signed) H. Squier, clerk.

49 U. S. district court, first judicial dist.

THE UNITED STATES }
vs.
J. H. ALVORD. }

We, the jury, find for the plaintiff in the sum of three thousand four hundred and fifty-nine dollars and twenty cents ($3,459 $\frac{20}{100}$).

(Signed) WESLEY MULKEY, *Foreman.*

(Endorsed:) Filed June 5th, 1873. H. Squier, clerk.

50 *Bill of exceptions.*

In the district court of the United States for the first judicial district of Idaho Territory, in and for the county of Nez Perce.

UNITED STATES OF AMERICA,
District of Idaho Territory:

THE UNITED STATES, PLAINTIFF, }
vs.
JAMES H. ALVORD, FRANKLIN SHISLER, James Baker, John Wood, and Loyal P. Brown, defendants. }

Be it remembered that at the May term of the district court of the United States, in and for the 1st judicial district of the Territory of Idaho, begun and holden at Lewiston, in the county of Nez Perce, in said Territory, on Monday, the 12th day of May, A. D. 1873, and duly continued from day to day, to and including the 5th day of June, A. D. 1873, when on said last-mentioned day, and on divers days and times during said term, and prior to said 5th day of June, A. D. 1873, the following proceedings were had, and the following exceptions made
51 and taken, & by the court allowed, in the above-entitled cause, to wit:

This cause came on to be heard upon the pleadings and proofs, Joseph W. Huston, United States district attorney, appearing for the plaintiff, and Milton Kelly, esqr., for the defendants.

Whereupon the pl'ff introduced a paper writing purporting to be a transcript from the records of the Treasury Department of the United States under the hands and seal of the proper officers; which said alleged transcript the said plaintiff offered in evidence, in support of the allegations of the complaint of pl'ff. To which said transcript the said defendants, by their counsel, objected, and filed thereto written objections and exceptions to the same upon the grounds "that the said transcript showed only the balances of accounts; whereas the said defendants claimed that the same should show not only the balances, but also the items of the accounts from which those balances were formed, so as to enable the court and jury to pass upon the items of the
52 accounts, which were before the officers of the Treasury, and which were passed upon by such officers in allowing or disallowing the accounts between the respective parties."

And the court, after having taken the same under advisement, decided that said transcript was insufficient and incomplete as evidence, and rejected the same.

And the said court then and there further ruled and decided in con-

nection with said last-mentioned ruling and decision that, from the nature and character of the defendants' answer, the said pl'ff was not required to produce any evidence in the affirmative of the case, but that said pl'ff was entitled "prima facie" upon the pleadings to recover judgment against said defendants.

To which latter ruling, to wit: "That from the nature and character of said defendants' answer, the said pl'ff was entitled to recover prima facie upon the pleadings a judgment against said defendants," the said defendants, by their said counsel, then and there, and in due form of
53 law, excepted, which said exception was then and there duly allowed by the court.

All which will more fully and at large appear by said transcript and objections thereto duly filed, and the pleadings in said cause which are hereby referred to and made a part of this bill of exceptions.

2nd. The defendants then and there filed affidavits and moved the court for a continuance of said action to the next term of said court upon said affidavits, to wit, one of James H. Alvord, one of said defendants, and another of D. L. Noggle, which motion, after argument of respective counsel and consideration of the court, was then and there overruled by the court.

To which said ruling of said court denying said motion, the said defendants, by their coun , then and there duly excepted, which said exception was then and there duly allowed by the court, which said affidavits and written notice of motion are on file and of record herein, and are hereby referred to and made a part hereof.

3rd. These questions as hereinabove set forth and the said
54 motions and decisions having been disposed of and were disposed of, settled, and determined by the court and without the presence of a jury and before the calling of the same, and by the consent of parties, and jury was then and afterwards called by the parties, and after being duly empanelled and sworn, the said pl'ff by Joseph W. Huston, U. S. attorney, submitted the case of the pl'ff to said jury and rested his case upon the pleadings and without producing or offering to produce any testimony whatever in support of the allegations of pl'ff's complaint, and rested pl'ff's case upon the pleadings.

Whereupon the said defendants, by said counsel, then and there moved said court for a nonsuit of said pl'ff upon the grounds—

First. That said pl'ff had not produced any proof whatever of the allegations of the said pl'ff's complaint, and,

2nd. That said pleadings did not entitle said pl'ff to a recovery against said defendants without proof of the allegations of said complaint.

3rd. That said action being founded in "tort" and the com-
55 plaint alleging a conversion, said pl'ff must prove such conversion, which he failed to do.

Whereupon the said motion being submitted without argument, the said court then and there overruled the same.

To which said ruling and decision of said court denying said motion the said defendants, by their counsel, then and there in due form of law excepted; which said exception was allowed by the court.

4th. That no testimony of any character whatever, except the transcript as aforesaid, which was rejected by the court, was introduced by

pl'ff in any stage of the proceedings and trial to the rendering of the verdict and the entry of judgment.

(Signed) MILTON KELLY,
Att'y for Def'ts.

The foregoing bill of exceptions have been examined by me and I hereby allow the same.

(Signed) W. C. WHITSON,
District Judge.

(Endorsed:) Filed July 12th, 1873. (Signed) H. Squier, clerk.

56 UNITED STATES OF AMERICA, *ss:*

To the United States, Hon. Joseph W. Huston, U. S. district attorney for the district of Idaho Territory, greeting:

You are hereby cited and admonished to be and appear at a supreme court of Idaho Territory, to be holden at Boise City, Ada County, I. T., on the first Monday of January, to wit, on the 5th day of January, A. D. 1874, pursuant to a writ of error filed in the clerk's office of the district court of the United States in and for the 1st judicial district of Idaho Territory, in and for the county of Nez Perce, wherein James H. Alvord, Franklin Shisler, James Baker, John Wood, and Loyal P. Brown are plaintiffs in error, and you are defendant in error, to show cause if any there be why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Hon. David Noggle, chief justice of the said supreme court of Idaho Territory, this 15th day of July, A. D. 1873.

57 [SEAL SUP. COURT.] (Signed) DAVID NOGGLE,
Chief Justice of the Supreme Court of Idaho Territory.

Attest:

(Signed) A. L. RICHARDSON, *Clerk.*

I hereby certify that I served the within citation by delivering a certified copy thereof to Jo. W. Huston, U. S. district attorney for the Territory of Idaho, on the 8th day of August, 1873, at Boise City, I. T.

(Signed) JOSEPH PINKHAM,
U. S. Marshal, I. T.

(Endorsed:) Filed July 31st, 1873. H. Squier, clerk 1st jud'l dist. Idaho Territory, by H. O. Adams, deputy.

58 In the district court of the 1st jud'l district of Idaho Territory.

THE UNITED STATES
vs.
JAMES H. ALVORD ET AL.

For good and sufficient reasons to me appearing, I do hereby extend the time for filing a bond on appeal to the supreme court of said Territory in the above-entitled cause until Thursday, the 2d day of September, A. D. 1873.

(Signed) W. C. WHITSON,
Dist. Judge.

(Endorsed:) Filed Aug. 2d, 1873. (Signed) H. Squier, clerk.

59 Know all men by these presents that we, James H. Alvord, Loyal P. Brown, as principals, and W'm B. Holmes, W'm Baird, Geo. L. Rogers, and Charles Schneider, as sureties, are held, and firmly bound unto the United States in the full and just sum of seven thousand three hundred and fifty dollars, to be paid to the United States, for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated this 30th day of August, A. D. 1873.

Whereas lately, at a term of the district court of the United States held in and for the first judicial district of the town of Lewiston, Nez Percé County, Idaho Territory, commencing on the 12th day of May, A. D. 1873, in a suit pending in said court between the United States, as plaintiff, and James H. Alvord, Loyal P. Brown, James Baker, Franklin Shissler, and John Wood, as defendants, a judgment was rendered against said defendants for the sum of three thousand four hundred and fifty-nine $\frac{20}{100}$ dollars ($3,459$\frac{20}{100}$) and one hundred and forty dollars costs, and the said defendants having obtained a

60 writ of error, and filed a copy thereof in the clerk's office of the said court to review the said judgment in the aforesaid suit, and a citation directed to the said plaintiff, and the plaintiff's said attorney, J. W. Huston, esqr., and admonishing them to be and appear at the supreme court of Idaho Territory, to be holden at Boise City, the 5th day of January next.

Now the condition of the above obligation is such, that if the said James H. Alvord, Loyal P. Brown, James Baker, Franklin Shissler and John Wood, shall prosecute their appeal to effect, and answer all damages and costs, if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) J. H. ALVORD, [SEAL.]
LOYAL P. BROWN, [SEAL.]
Principals.
W. B. HOLMES, [SEAL.]
CHA'S SCHNEIDER, [SEAL.]
GEO. L. ROGERS, [SEAL.]
W'M BAIRD, [SEAL.]
Sureties.

Sealed and delivered in presence of witness:
N. W. EARL.

61 TERRITORY OF IDAHO,
County of Idaho, ss:

W. B. Holmes and Charles Schneider, being each duly sworn, deposes and says, that they are severally worth the sum of one thousand dollars over and above all their just debts and liabilities, exclusive of property exempt from execution, and that they are householders in said county as aforesaid.

(Signed) W. B. HOLMES.
CHA'S SCHNEIDER.

Subscribed and sworn to before me this 30th day of Aug., A. D. 1873.

[SEAL.] D. L. NOGGLE,
Notary Public, Idaho Co., I. T.

TERRITORY OF IDAHO,
County of Nez Perce', ss:

George L. Rogers, being duly sworn, deposes and says he is worth

the sum of twenty-five hundred dollars, over and above all just debts and liabilities, exclusive of property exempt from execution, in unincumbered property situated within this county.

And William Baird, being also duly sworn, deposes and says,
62 he is worth the sum of twenty-eight hundred and fifty dollars, exclusive of property exempt from execution, in unincumbered property situated in said county.

(Signed) GEO. L. ROGERS.
W'M BAIRD.

Subscribed and swonr to before me, in witness whereof I have hereunto set my hand and affixed my official seal this 2d day of September, 1873.

[SEAL.] (Signed) H. O. ADAMS.
Notary Public.

(Endorsed:) Filed Sept. 2d, 1873. (Signed) H. Squier, clerk.

Approved Sept. 2d, 1873.
(Signed) W. C. WHITSON,
Dist. Judge.

63 *Undertaking on writ of error.*

In the district court of the United States, 1st judicial district of Idaho Territory, in and for the county of Nez Perce.

THE UNITED STATES, PLFF.,
vs.
JAMES H. ALVORD, FRANKLIN SHISSLER, James Baker John Wood, and Loyal P. Brown, defendants.

Whereas a writ of error has been duly sued out of the supreme court of Idaho Territory to review a judgment of the above-named district court rendered at the June term thereof against said defendants.

Now, therefore, in consideration thereof and to make the same effectual we hereby undertake in the sum of three hundred dollars that the said defendants will pay all costs that may be awarded against the said defendants on their writ of error in the above entitled action, not exceeding said sum of three hundred dollars.

64 Aug. 25th, A. D. 1873.

(Signed) GEO. M. SHEARER. [L. S.[
N. W. EARL. [L. S.]

TERRITORY OF IDAHO,
County of Idaho, ss:

George M. Shearer and N. W. Earl, being each duly sworn, depose and say, that they are severally worth the sum of three hundred dollars, specified in the foregoing undertaking on writ of error and are householders (or freeholders in said county and Territory), and are severally worth said sum over and above all their just debts and liabilities exclusive of property exempt from execution.

(Signed) GEO. M. SHEARER.
N. W. EARL.

Subscribed and sworn to before me this 25th day of Aug., A. D. 1873.

[SEAL.] (Signed) D. L. NOGGLE,
Notary Public Idaho Co., I. T.

(Endorsed:) Filed Sept. 2, 1873. H. Squier, clerk.

Approved, Sept. 2d, 1873.
(Signed) W. C. WHITSON,
Dist. Judge.

65 *Stay of proceedings.*

In the district court of the United States, 1st judicial district of Idaho Territory, in and for the county of Nez Perce.

THE UNITED STATES, PLFF.,
vs.
JAMES H. ALVORD, FRANKLIN SHISSLER, James Baker, John Wood, and Loyal P. Brown, defendants.

It appearing to me that a "writ of error" has been duly sued out of the supreme court of Idaho Territory and directed to the judge of the 1st judicial district of said Territory; and that a citation has been duly issued and served herein; and that a bond has been duly given by said defendants and duly approved for a stay of proceedings, as required by law. It is hereby ordered that all proceedings in the above-entitled cause be, and the same are hereby, stayed until the final hearing and determination of said writ of error in said supreme court.

66 Done at chambers, at Lewiston, this 2d day of Sept., A. D. 1873.

(Signed) W. C. WHITSON,
District Judge of the 1st Judicial District of Idaho Territory.

(Endorsed:) Filed Sept. 2, 1873. (Signed) H. Squier, clerk.

67 *Court record.*

MAY 14, 1873.

On motion of A. Leland, he was allowed by the court to file affidavits of John Wood, one of the bondsmen of the defendant.

MAY 16, 1873.

Alonzo Leland gave notice of motion to release John Wood, one of the sureties on defendant's bond.

MAY 20TH, 1873.

This cause coming on to be heard, Jo. W. Huston, esqr., appeared for the plaintiff, and Milton Kelly, esqr., on the part of the defendants. Defendants' counsel asked leave to amend the verification to their answer, which was granted by the court.

MAY 28TH, 1873.

This cause coming on to be heard, defendants' attorney asked leave to file motion and affidavits for a continuance of this case. After hear-

ing the argument of the respective counsel, the court took the case under advisement.

MAY 29TH, 1873.

The court overruled the motion for a continuance submitted by defendants' counsel.

68 JUNE 3D, 1873.

The trial of this cause was set for Wednesday morning at 10 o'clock, whereupon, by agreement of the respective counsel, it was ordered by the court that a venire facias be issued for eighteen persons from which to select a jury for the trial of this case, and that the persons so summoned be required to be in attendance on this court Wednesday morning, June 4th, at half past nine o'clock.

JUNE 4TH, 1873.

This cause coming on to be heard, Jo. W. Huston, esqr., United States attorney, appeared for the plaintiff, and Milton Kelly, esqr., for the defendant'. The court directed the clerk to draw a jury for the trial of this case in the manner prescribed by law, whereupon the following persons were duly drawn, passed upon by the counsel both for the plaintiff and defendant, empanneled and sworn as such aforesaid jury, to wit: J. G. Berry, Geo. Glass, Moses Hexter, W. S. Dyn, John Brairley, Alfred Damas, J. W. Dormer, J. P. Volnier, C. A. Thatcher, T. S. Billings, Levi Ankeny, and W. Mulkey.

69 James H. Alvord and D. L. Noggle were duly sworn and examined on the part of the defendant. The evidence having been submittted, the respective counsel proceeded to the argument of the case. Now, at 10½ o'clock p. m., the court having admonished the jurors in this case that they were neither to converse among themselves nor suffer any person to converse with them or in their presence in regard to this matter, excused said jurors until to-morrow morning at 9 o'clock a. m.

JUNE 5TH, 1873.

The trial of this cause being resumed by consent of the counsel of the respective parties, plaintiff and defendant, Moses Hexter, one of the jurors in this case, was excused by the court, and the trial proceeded with a panel of eleven jurors.

The court having hear' the argument of the respective counsel, delivered its charge to the jury, whereupon the said jury were permitted to retire under the charge of a sworn officer to consider of their verdict.

70 The jury came into court, and having been first duly polled, and each and all having answered to their names, presented, through their foreman, the following verdict, which was ordered to be entered of record, to wit:

We, the jury, find for the plaintiff in the sum of three thousand four hundred and fifty-nine dollars and twenty cents ($3,459\frac{20}{100}$.)

(Signed) WESLEY MULKEY,
Foreman.

71 *Judgment.*

The jury in the above entitled case having returned a verdict in favor of the plaintiff and against the defendants, for the sum of three thou-

sand four hundred and fifty-nine dollars and twenty cents ($3,459.$\frac{20}{100}$), on motion of Jo. W. Huston, esq'r, U. S. attorney, it is ordered that a rule be entered in said cause by the clerk of this court requiring the said defendants to show cause on this 5th day of June, 1873 (the said court being about to adjourn on this day), why judgment should not be entered upon said verdict.

The said defendants are therefore required to show cause on this 5th day of June, 1873, why judgment should not be entered upon said verdict rendered in said cause.

And now, on this 5th day of June, A. D. 1873, the said defendants, James H. Alvord, Franklin Shissler, James Baker, John Wood, and Loyal P. Brown, nor any nor either of them having shown cause to the satisfaction of said court why judgment should not be entered
72 upon said verdict, and the court having had the same under consideration, it is ordered and adjudged by the court now here that the said plaintiff, the United States, do have and recover of and from the said defendants James H. Alvord, Franklin Shissler, James Baker, John Wood, and Loyal P. Brown the sum of $3,459.20 *dollars*, together with the costs of said suit, taxed at $178.$\frac{20}{100}$, and that the plaintiff do have execution therefor.

On motion of defendants' counsel, it is ordered that execution be stayed in this cause for sixty days from the entry of judgment, and defendants may have forty-two days to file a motion and petition for a new trial, or file a bill of exceptions.

(Signed) W. C. WHITSON,
Dist. Judge.

73 TERRITORY OF IDAHO,
County of Nez Perce, ss:

I hereby certify the foregoing and above to be full, true, and correct copies of the answer, appearance of A. Leland, esqr., affidavit of John Wood, affidavits of Alvord and Noggle, bill of exceptions of def'ts, demurrer of defendants, complaint, citation, extension of time for filing bond on appeal, motion of John Wood for attachment, motion of John Wood to be discharged, motion of defendants for a continuance, objections of defendants to transcript, order of court staying proceedings, summons, stipulation for filing answer, *stipulation for filing answer*, stipulation for a continuance, undertaking for costs on appeal, undertaking on writ of error, & verdict, and also of the court records in the above-entitled cause, as they now appear of record in my office.

Witness my hand and the seal of the U. S. dist. court of the 1st judicial dist. of Idaho Territory, this 10th day of October, A. D. 1873.

[SEAL.] H. SQUIER,
Clerk said Court.

74 (Endorsed:) Supreme court, Idaho Territory. James H. Alvord et al., plaintiffs in error, vs. The United States, defendant in error. Writ of error from dist. court 1st jud'l dist. Nez Perce Co., I. T. J. R. McBride & M. Kelly, att'ys for pl'ff in error. A. Leland for pl'ff Wood. J. W. Huston, U. S. district att'y, att'y for def't in error. Filed November 14th, A. D. 1873. A. L. Richardson, clerk.

75 *Record entries in sup. court I. T.*

In the supreme court of Idaho Territory begun and held at Boise City, I. T., January 5th, A. D. 1874, and adjourned, without day, February 3d, A. D. 1874.

JANUARY 5TH, A. D. 1874.

JAMES H. ALVORD ET AL., PLAINTIFFS IN ERROR,
vs.
THE UNITED STATES, DEFENDANT IN ERROR. } U. S. civil No. 1.

By agreement of counsel for the respective parties herein, ordered that this cause be, and the same is hereby, continued.

76 In the supreme court of Idaho Territory begun and held at Boise City, I. T., January 5th, A. D. 1875, and adjourned, without day, February 5th, 1875.

JANUARY 7TH, A. D. 1875.

JAMES H. ALVORD ET ALS., PLAINTIFFS IN ERROR,
vs.
THE UNITED STATES, DEFENDANT IN ERROR. } U. S. civil, No. 1.

Now on this day this cause came regularly on to be heard. Mess'rs Smith & Kelly appeared on behalf of plaintiffs in error, and J. W. Huston, esqr., U. S. dist. attorneys for the defendant in error. After argument by counsel for the respective parties, said cause was taken under advisement by the court.

JANUARY 18TH, A. D. 1875.

JAMES H. ALVORD ET ALS., PLAINTIFFS IN ERROR,
vs.
THE UNITED STATES, DEFENDANT IN ERROR. }

77 And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement by the court, and all and singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is delivered by Associate Justice M. E. Hollister to the effect that the judgment of the court below be affirmed.

Whereupon it is now considered, ordered, adjudged, and decreed by the court here that the judgment of the district court of the first judicial district in the above-entitled cause be, and the same is hereby, affirmed with costs.

JANUARY 25TH, A. D. 1875.

JAMES H. ALVORD ET ALS., PL'FFS IN ERROR,
vs.
THE UNITED STATES, DEF'T IN ERROR. } U. S. civil, No. 1.

Now came Alanson Smith, esqr, of counsel for plaintiff in errorh erein, and moved the court to fix the amount of the bond on writ of error to the Supreme Court of the United States in this cause. Upon consideration whereof the court ordered, that the amount of said bond be, and the same is hereby, fixed at the sum of five thousand dollars.

78 *Opinion of supreme court, I. T.*

In the supreme court of the Territory of Idaho, January term, A. D. 1875.

JAMES H. ALVORD ET AL., PL'FFS IN ERROR,
vs.
THE UNITED STATES.

SYLLABUS.

1. A party is not entitled to a continuance without showing due diligence and the use of legal means to procure his evidence.

2. A bare request to furnish the evidence is in no sense a compliance with the requirements of the law. Thus a request to the accounting officers of the Treasury Department of the United States to furnish a party with a transcript of his accounts which he had rendered, and the vouchers therefor, which request was refused, does not entitle him to a continuance to enable him to procure such testimony.

3. Where a witness is beyond the reach of the process of the court, a party desiring to take his testimony must sue out a commission
79 to take his deposition, and a failure to do so shows a want of due diligence and a neglect of the use of the proper means to obtain the evidence.

4. Where documentary evidence, which a party needs in the trial of a cause, is in the hands or under the control of the opposite party, before the latter can be required to produce it on the trial he must have due notice thereof; when he has it in his possession at the trial, notice at the time is sufficient, otherwise the notice to be effectual must be served upon him a sufficient length of time before the trial to enable him to produce it.

5. Where the allegations of a complaint are not denied by the defendant, the plaintiff is entitled to judgment on the pleadings without proof to support them, and in such a case the onus probandi is upon the defendant in the first instance to support the answer.

6. In a suit upon a bond for a breach of duty an allegation that the defendant unlawfully converted money to his own use, does not covert the action into one of tort.

80 *Opinion by Justice Hollister.*

Error to Nez Perce County.

This is a suit brought by the United States on an official bond executed by the defendant Alvord, as marshal of the Territory of Idaho, as principal, and the other defendants as sureties, for the sum of $\$6{,}210\frac{83}{100}$, balance of the sum of twenty thousand dollars, which the complaint alleges Alvord received, to be paid, laid out, and expended in paying the expenses of the several courts of the United States within the Territory, and to account therefor to the proper accounting officers of the Treasury Department, and that he failed to do so, but converted the same unlawfully to his own use. The answer admits the receipt of the money for such purpose, but pleads as a set off the payment of the same for various other purposes and on various other accounts for which the United States was responsible.

Here is a general denial of indebtedness as charged in the complaint,

but this denial when taken in connexion with the accounts on
81 which it is claimed the money was expended, must be understood that he is not indebted because such accounts constitute a valid and complete set off to the plaintiff's demand.

The answer contains a statement or bill of particulars of the account thus pleaded as a set off, by which it appears that it consisted of items entirely different from the expenditure which it was his duty to make, as for instance $2,102\frac{50}{100}$ for office rent; $500 for expenses in pursuit of a person charged with robbing the mail; $218\frac{50}{100}$ for guarding prisoners; $482\frac{25}{100}$ for expenses in pursuing a person indicted for embezzlement; $487\frac{50}{100}$ for suppressing a riot; $326.25 for expenses in capturing an escaped criminal; $600 expenses in taking care of United States property and bringing the same to Boise City, and various other items, none of which, except perhaps the sum of $153\frac{72}{100}$, were expended in defraying the expenses of the courts, as it was alleged it was his duty to do.

On the trial the plaintiff's counsel submitted his case to the
82 jury without offering any evidence in support of it, whereupon the defendants moved for a non-suit, which motion was denied by the court. In this we think the court committed no error, as the plaintiffs by the pleadings were entitled to judgment.

The defendants then introduced their testimony and the jury rendered a verdict against them for $3,459\frac{21}{100}$, and there was judgment accordingly.

Before the case was called for trial, the defendants moved for a continuance on the ground of their inability to prepare for the trial, and because they needed testimony material to the defense.

It appears from the affidavits filed in support of the motion that defendants had made application to the accounting officers of the Treasury Department for vouchers which it was claimed would show the expenditure of the moneys as stated and set forth in the answer, and which had been sent to the department on settlement of accounts, which accounts had been disallowed. The affidavits also showed that like application had been made for a transcript of Alvord's accounts
83 with the government, and that both applications had been denied. The affidavits showed further that information of such refusal had so recently been received that the defendants had not had time to prepare for the trial for want of such testimony.

This motion was denied by the court and exceptions taken to the ruling of the court thereon. We are unable to discover that the court erred in overruling this motion.

The defendants were required to show not only reasonable diligence in their efforts to procure the testimony, but also that they had employed the necessary means therefor. The persons who had the custody of these vouchers and who alone could furnish the transcript were beyond the jurisdiction of the court and out of the reach of its process, and it therefore became the duty of the defendants to sue out a commission to take their depositions, and to have attached thereto a copy of the
84 required papers. This they failed to do. It is urged, however, that the vouchers and transcript being in the possession of and under the control of the adverse party, it was bound to furnish them on request for the use of the defendants, conceding for the sake of the argument that these accounting officers represented the government for this purpose, still the defendants did not pursue the proper method to attain the object.

It is a well-settled rule, that if documentary evidence is in the possession and under the control of a party to a suit which is material to the

adverse party, he cannot be required to produce it, except upon due notice. If such party has the evidence in his possession at the trial, notice upon the trial is sufficient; if not, then the notice must be served in time to enable him to produce it on the hearing of the case. In this case the defendants had no legal right to demand these vouchers of the accounting officers. They became a part of the records or files of the de-
85 partment as evidence of the claims which had been rejected, and as proofs of their invalidity, and could not without detriment to the public service be withdrawn from the office. The most that defendants could require were office copies of the papers as evidence.

We claim that this was an action ex delicto, because the complaint alleges a conversion of the money to Alvord's use is not tenable. It is true the allegation is not in apt terms to charge Alvord with having received the money to plaintiff's use, yet taken in connexion with the whole of the complaint, this is to be considered as its legal effect, and as in no sense the conversion of an action ex contractu with one in tort.

On the whole we discover no error in the proceedings of the court below, and its judgment must therefore be affirmed.

HOLLISTER, *Justice.*

I concur.

WHITSON, *Justice.*

86 (Endorsed;) In the sup. ct. Jan. term, 1875. Alvord et al., pl'ffs in error, vs. The United States. Opinion by Justice Hollister. Filed Jan'y 18th, 1875. A. L. Richardson, clerk.

87 In the Supreme Court of the United States.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the supreme court of Idaho Territory, greeting:

Because in the record & proceedings, & also in the rendition of the judgment of a plea which is in the said supreme court of Idaho Territory, before you, between James H. Alvord, Franklin Shissler, James Baker, John Wood, & Loyal P. Brown, pl'ffs in error, & *the* The United States, the defendant in error, a manifest error hath happened, to the great damage of the said pl'ffs in error, as by their complaint appears: we, being willing that the error, if any hath been, should be duly corrected, & full & speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly & openly, you send the record & proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the second Monday in October next, in the said Supreme Court to be then & there held, that, the record & proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, & according
88 to the laws & customs of the United States, should be done.

Witness the honorable Morrison S. Waite, Chief Justice of the said Supreme Court, the fifth day of March, in the year of our Lord one thousand eight hundred & seventy-five.

[SEAL.] A. L. RICHARDSON,
Clerk of the Supreme Court of Idaho Territory,
& the seal thereof attached.

The foregoing writ of error is hereby this day allowed by me. March 5th, A. D. 1875.

JOHN CLARK,
Associate Justice of the Supreme Court of Idaho Territory.

(Indorsed:) Supreme Court of the United States. James H. Alvord, et al., pl'ffs in error, vs. The United States, def't in error. Writ of error. Smith & Kelley, att'ys for pl'ff in error. Filed March 5th, 1875. A. L. Richardson, clerk.

89 *Bond.*

In the Supreme Court of the United States.

JAMES H. ALVORD, FRANKLIN SHISSLER, James Baker, John Wood, & Loyal P. Brown, plaintiffs in error,
vs.
THE UNITED STATES, DEFENDANT IN ERROR.

Know all men by these presents that we, C. B. Toothaker, H. H. Wheeler, F. B. King, and James Odle, are held and firmly bound unto the United States, the said defendant in error above named, in the sum of five thousand dollars ($5,000.00), lawful money of the United States, to be paid to the said the United States, the said defendant in error, his executors, or administrators. To which payment, well and truly to be made, we bind ourselves, & each of us, jointly & severally, firmly, & our and each of our heirs, executors, & administrators, firmly by these presents, sealed with our seals, & dated this 20th day of February, in the year of our Lord one thousand eight hundred and seventy-five.

90 Whereas the above-named James H. Alvord, Franklin Shissler, James Baker, John Wood, & Loyal P. Brown, plaintiffs in error, have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the supreme court of Idaho Territory:

Now, therefore, the condition of this obligation is such that if the above-named James H. Alvord, Franklin Shissler, James Baker, John Wood, & Loyal P. Brown, the said plaintiffs in error, shall prosecute their said writ of error to effect & answer all damages & costs, including just damages of delay, if they shall fail to make good their plea, then this obligation shall be void; otherwise, the same shall be & remain in full force & virtue.

(Signed) C. B. TOOTHAKER. [L. S.]
F. B. KING. [L. S.]
JAMES ODLE. [L. S.]
H. H. WHEELER. [L. S.]

Signed, sealed, & delivered in the presence of—
D. H. HOWSER and
B. F. MORRIS.

TERRITORY OF IDAHO,
County of Idaho, ss:

We, the undersigned, being each & severally duly sworn, depose & say, & each for himself & not one for the other, deposes & says,

91 that he is a resident of the Territory of Idaho, & a householder & freeholder therein; that he is worth the sum of twelve hundred

and fifty dollars over and above all his debts & liabilities, exclusive of property exempt from execution, in unincumbered property situated within said Territory of Idaho.

(Signed) C. B. TOOTHAKER.
F. B. KING.
JAMES ODLE.
H. H. WHEELER.

Subscribed & sworn before me this 20th day of Feb'y, A. D. 1875.
[SEAL.] H. SQUIER,
Clerk Dist. Court, 1st Dist., I. T.,
P'r W'M BAIRD, *Deputy.*

(Endorsed:)

I hereby approve the foregoing bond in the case of James H. Alvord et al., pl'ffs in error, vs. The United States, defendant in error, & of the sureties therein.

March 5th, 1875.

(Signed) JOHN CLARK,
Associate Justice of the Supreme Court of Idaho Territory.

(Endorsed:) Filed March 5th, 1875. A. L. Richardson, clerk.

92 TERRITORY OF IDAHO,
County of Ada, ss:

I, A. L. Richardson, clerk of the supreme court of Idaho Territory, hereby certify the foregoing to be a full, true, and correct copy of the original bond on writ of error to the Supreme Court of the United States in the case of James H. Alvord et al., plaintiffs in error, vs. The United States, defendant in error, now remaining on file in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said court at my office in Boise City, I. T., this 31st day of August, A. D. 1875.

[SEAL.] A. L. RICHARDSON, *Clerk.*

93 UNITED STATES OF AMERICA, *ss:*

To The United States to *the* J. W. Huston, esqr., the district attorney of the United States in & for the Territory of Idaho, greeting:

You are hereby cited and admonished to be & appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Idaho Territory, wherein James H. Alvord, Franklin Shissler, James Baker, John Wood, & Loyal P. Brown are plaintiffs in error, & the United States are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, & speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison S. Waite, Chief Justice of the said Supreme Court of the United States, this 5th day of March, in the year of our Lord one thousand eight hundred & seventy-five.

JOHN CLARK,
Associate Justice of the Supreme Court of Idaho Territory.

94 On this fifth day of March, in the year of our Lord one thousand eight hundred & seventy-five, personally appeared Joseph Pinkham, United States marshall in & for Idaho Territory, be-

fore me, the subscriber, & makes oath that he delivered a true copy of the within & foregoing citation to Joseph W. Huston, esq., the district attorney of the United States in & for the Territory of Idaho.

(Signed) JOS. PINKHAM,
U. S. Marshal for Idaho,
By J. S. GRAY, *Deputy.*

Subscribed & sworn before me this 5th day of March, in the year 1875.
A. L. RICHARDSON,
Clerk of the Supreme Court of Idaho Territory.

(Indorsed:) Supreme Court of the United States. James H. Alvord et al., pl'ffs in error, vs. The United States, def't in error. Citation on writ of error. Smith & Kelly, att'ys for pl'ffs in error. Filed March 5th, 1875. A. L. Richardson, clerk.

95 TERRITORY OF IDAHO,
County of Ada, ss:

I, A. L. Richardson, clerk of the supreme court of Idaho Territory, hereby certify that the foregoing contains a true copy of the record and proceedings in the case of James H. Alvord et al., pl'ff' in error, vs. The United States, defendant in error, lately decided in said court, and of the whole thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Boise City, in said Territory, this 31st day of August, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.] A. L. RICHARDSON,
Clerk.

(Indorsement on cover:) No. 329. James H. Alvord, Franklin Shissler, James Baker, John Wood, & Loyal P. Brown, plaintiffs in error, vs. The United States. Idaho Terr'y sup. c't. Filed 13th December, 1875.

Supreme Court of the United States.

OCTOBER TERM, 1878.

No. 68.

JAMES H. ALVORD ET ALS., PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES, DEFENDANTS IN ERROR.

And now comes Franklin Shissler, John Wood, and Loyal P. Brown, three of the said plaintiffs in error, by their counsel, J. W. Denver, and moves the Court to vacate the order made at the present term of the Court, under the 16th rule, dismissing the writ of error in said entitled cause and to reinstate said appeal for the reason that said parties had no notice that said case would be called and that they were not represented by counsel, because of a misunderstanding or misapprehension, as will more fully appear from the affidavit of Hon. C. G. Williams, the attorney of record herewith filed.

DISTRICT OF COLUMBIA,
City of Washington, } *ss:*

Before me personally appeared Chas. G. Williams, who being duly sworn, deposes and says that he is a member of the House of Representatives of the Congress of the United States, and resides at Janesville, Wisconsin, that at the request of James H. Alvord, the principal, and one of the plaintiffs in error, in the case of Alvord, *et al.* vs. the United

States in the Supreme Court of the United States, error from the supreme court of the Territory of Idaho, he appealed in said case as attorney for the plaintiff in error, *pro forma* with the understanding that other attorneys would be employed and appear in the case before it should be reached for trial; that he gave the case no attention whatever upon its merits, supposing such attorneys had appeared or would appear if it was desired to try the case; that he remembers receiving a notice at sometime at his home in Janesville, Wisconsin, that said case would be reached for trial, but supposing for the reason above stated that other parties were looking after the case, he gave said notice no attention whatever.

C. G. WILLIAMS,

Subscribed and sworn to before me this 29th day of March, A. D. 1879.

[SEAL.] JAS. H. MCKENNEY,
Notary Public, District of Columbia.

DISTRICT OF COLUMBIA,
City of Washington, } *ss:*

Before me personally appeared S. S. Fenn, who being duly sworn, says, that his name is Stephen S. Fenn; that he is fifty-nine years of age; that he resides near Mount Idaho, in the Territory of Idaho, and that he has been a delegate in Congress from said Territory for four years past; and said deponent further states that he was well acquainted with James H. Alvord, late United States Marshal of said Territory, and also with the sureties on his bond, viz: John Wood, Frank Schissler, Loyal P. Brown and James Baker; that said James Baker resided at White Bird in Idaho county, Idaho Territory, about eighteen miles from the residence of his affiant, where he, the said Baker, was killed by the Indians on the 14th day of June, A. D. 1877,

at the time of the outbreak of the Nez Perce tribe of Indians under the chiefs Joseph and White Bird.

And this affiant further says that he was not present at the time said Baker was killed, being here at Washington in the discharge of his official duties at the time, but he learned the facts from his neighbors after he returned to his home, and he knows of his own knowledge that some time in the summer or early fall of the year 1877, George Woodward of Mount Idaho aforesaid, was appointed administrator of the estate of said James Baker deceased, and that said appointment was duly made by the Probate Judge of said Idaho county, and that said George Woodward was still acting as such administrator within thirty days last past, as this affiant verily believes from information through letters from residents of Mount Idaho lately received; and further, that he knows personally that he, the said Woodward, was so acting during the first week in November, A. D., 1878, at the time this affiant left to come to Washington, D. C.

S. S. FENN.

Subscribed and sworn to before me, this 28th day of March, A. D. 1879.

[SEAL.] CHAS. B. BEALL.
Notary Public.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

JAMES H. ALVORD AND OTHERS
vs.
THE UNITED STATES.
} No. 68.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

JAMES H. ALVORD AND OTHERS
vs.
THE UNITED STATES. } No. 68.

BRIEF FOR THE UNITED STATES.

This is a suit upon two bonds, given during the years 1865 and 1866, to secure performance by the defendant, Alvord, of his duties as marshal of the United States for Idaho Territory; and the breach relied upon is the failing to account for the sum of $6,210.83, balance of moneys received from the United States.

The defendants by their answer admitted the receipt of the moneys as alleged, but asserted that the marshal had accounted for and paid it over, and in that connection set forth a list of items of expenditures which had been presented to and rejected by the proper accounting-officer of the Treasury.

The answer is verified by the oath of Mr. Kelly, one of the attorneys for the defendants, who alleges that at that time, September 14, 1872, *he had in his hands Alvord's accounts and duplicate vouchers* (folio 28).

The plaintiffs introduced no evidence at any stage of the case.

When the cause was called for trial (at May term, 1873) the court refused to grant the defendants a continuance asked for upon affidavits, stating:—that the marshal had filed the original vouchers for the items contained in the answer with the Second Comptroller of the Treasury, and after the rejection of the claim founded thereon (in February, 1872) had applied to have such vouchers returned to him, but the application was refused upon the ground that the vouchers must remain among the records of the department: and that since defendants had received information of such rejection, they had not had time to take other steps, &c. (folios 44, &c.)

At the trial, upon objection by the defendants, the court excluded the Treasury transcript of the marshal's accounts which had been offered in evidence by the plaintiffs, but ruled further that in the state of the pleadings there was no occasion for them to introduce any testimony, as the burden of proof was upon the defendants. Accordingly the plaintiffs introduced no evidence at any stage of the case.

To this ruling the defendants excepted.

They also submitted to the court (folio 55) that inasmuch as the plaintiffs in declaring upon the bonds had alleged that the defendant, Alvord, *had unlawfully converted and appropriated to his use* (folio 7) the balance of moneys unaccounted for, the action was in effect one in tort, and so obliged the plaintiffs to prove the *conversion* alleged.

The jury returned a verdict for $3,459.20, and there was a judgment accordingly.

The exceptions require no detailed argument in reply.

1. Questions of *continuance* are addressed to the discretion of the court, and therefore are not matters of *error* (20 Howard, 195). Besides, under the affidavit of Mr. Kelly (folio 28), stating his possession of *duplicate vouchers* in September, 1872, after the others had been filed in the Treasury, it is seen that no injury was done to the defendants in overruling their objection on account of the absence of the vouchers in the Treasury.

2. The pleadings are not artistic, but virtually they throw the burden of proof upon the defendants.

3. The point as to *conversion* seems to require no reply.

S. F. PHILLIPS,
Solicitor General.

O